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Supreme Court

of the

United States

No. 871

NORMAN F. DACEY,

Petitioner,

vs.

THE FLORIDA BAR, INC., et al.,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported in 414 F.2d 195.

QUESTION PRESENTED

The Court of Appeals affirmed the District Court's dismissal, holding that there was no federal jurisdiction. The Court expressly stated it was not deciding any issue of tort immunity (although Petitioner here concedes there is tort immunity if The Florida Bar is a state agency).

For these reasons, we prefer to restate the question presented as follows:

> IS THE FLORIDA BAR A PART OR AN AGENCY OF THE STATE OF FLORIDA SO THAT IT IS NOT A "CITIZEN" UNDER 28 U.S.C. §1332 FOR FEDERAL JURISDICTION BASED ON DIVERSITY OF CITIZENSHIP?

STATEMENT OF THE CASE

In most respects Petitioner's[1] Statement is accurate and summarily complete. In stating in the second sentence that the Florida Supreme Court "promulgated the Integration Rule which set forth the powers and responsibilities of the Florida Bar" Petitioner fails to go far enough and state the even more essential fact that the Florida Supreme Court created The Florida Bar. In the Preamble to the Integration Rule the Florida Supreme Court stated *inter alia* (32 F.S.A. 497):

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[1]Throughout this litigation Petitioner has carelessly or calculatedly never referred to Respondent by its proper name, The Florida Bar. Article I, Integration Rule, 32 F.S.A. 498. The designation of the Respondent as The Florida Bar, *Inc.* in the filing of this suit by Petitioner was improper, and he has never changed it. In the Question (Pet. 2) Petitioner refers to Respondent as the "Florida Bar Association" and he incorrectly repeats this in the first line on page 6. Even the voluntary state-wide bar association which existed in Florida before the Florida Supreme Court created the integrated "The Florida Bar" was not known as the Florida Bar Association. It was the Florida *State* Bar Association. *Petition of Florida State Bar Association* (Fla. 1949) 134 Fla. 851, 40 So.2d 902. Elsewhere Petitioner refers to Respondent as "the Florida Bar" in the second and last sentences of the first paragraph of the Statement. (Pet. 2-3) Only where he commences the third sentence with the words "The Florida Bar" does Petitioner by coincidence accurately state the name.

"(a) The Florida Bar, *a body created by and existing under the authority of this Court*, is charged with the maintenance of the highest standards and obligations of the profession of law, and to that end is vested by this Court, in exercise of its inherent powers over *The Florida Bar as an official arm of this Court*, with the necessary powers and authority.

"(b) Attorneys admitted to practice law in Florida are a part of the judicial system of Florida and officers of its courts." (Emphasis supplied.)

and then commenced the rule as follows:

"Article I. Name

The name of *the body created by this Rule* shall be THE FLORIDA BAR."

(Emphasis supplied)

ARGUMENT

The Petition does not demonstrate that the decision sought to be reviewed comes within any class of cases which this Court will consider reviewing under Rule 19.1.(b). Revealingly the Petition does not even state that the decision comes within any class described in Rule 19.1.(b).

Petitioner does not contend that the decision is in conflict with the decision of another court of appeals or that it involves an important state question and conflicts

with applicable state law or that the Court of Appeals for the Fifth Circuit departed from the accepted and usual course of judicial proceedings.

The only other classes under Rule 19.1.(b) are those decisions involving questions of federal law which are either so important that they should be settled by this Court or which conflict with applicable decisions of this Court. Each, however, relates only to a federal question and there is no federal question here. The only question here is one of state law.

The decision below goes no further than deciding that the District Court did not have jurisdiction on the basis of diversity of citizenship because The Florida Bar was an agency of the State of Florida and therefore was not a "citizen" under the diversity of citizenship provision in 28 U.S.C. §1332. Petitioner does not contend here that The Florida Bar is a "citizen" under 28 U.S.C. §1332 even if it is an agency of the State of Florida. Hence, tacitly Petitioner admits that if the Court of Appeals was correct in finding that Respondent was an agent of the State of Florida, then it is not a "citizen" under the statute and the District Court lacked jurisdiction.

Petitioner's position in the last analysis is that if The Florida Bar is a state agency, then the District Court lacked jurisdiction, but if it is not a state agency, the District Court has jurisdiction. Stripped to the essentials, there is only one question Petitioner seeks to have reviewed, and that is whether the Court of Appeals was correct in finding that The Florida Bar was an agency or a part of the State of Florida. This is not a federal question, but purely a question of state law. *Kirby Lumber Corp. v State*

of Louisiana, (5th Cir. 1961) 293 F.2d 82; *Louisiana Land and Exploration Company v. State Mineral Board*, (5th Cir. 1956) 229 F.2d 5, cert. denied 351 U.S. 965; *Louisiana Highway Commission v. Farnsworth*, (5th Cir. 1935) 74 F.2d 910, cert. denied 294 U.S. 729.

Integrated bars are alike only in one respect, and that is in principle the bar administers disciplinary proceedings. Even in that function all procedures are different. Integrated bars differ in other respects also, depending on the number and kind of functions delegated to them. For example, The Florida Bar was not charged with the investigation and prosecution of unauthorized practice of law when The Florida Bar was created by the Florida Supreme Court in 1949, but such duties were given to it by Supreme Court Rule in 1965. 32 F.S.A. 565, et seq.; *In re The Florida Bar* (Fla. 1965) 175 So.2d 530.

The determination of the status, powers, duties, etc. of any integrated bar is a question for determination by the courts of the state thereof. No federal power or law is involved in either the creation or continuation of an integrated state bar. The Court of Appeals acknowledged all of this and adopted the status of The Florida Bar as it had been determined and characterized by the Florida Supreme Court.

For all these reasons there is no federal question presented here.

Neither is there a question of such importance as to require a decision by this Court. Since each integrated bar is a creation of and for a single state — each with its own functions, powers and procedures — and, therefore, each

different from the other, any decision here by this Court would not be a precedent for any other case involving any other integrated bar. There is no showing that there are any other cases pending or problems existing where the disposition thereof would be facilitated by this Court reviewing this decision. This case is not "important" in the context of Rule 19.1.(b).

The decision does not conflict with any decision of this Court. Petitioner tries vaguely to imply that it conflicts with *Lathrop v. Donahue* (1961) 367 U. S. 820 but understandably, he does not say it conflicts. He notes that there this Court was divided in affirming a decision of the Wisconsin Supreme Court which held that Wisconsin, as a condition to the right to practice law, could require an attorney to pay dues to the integrated bar, even though it supported causes which he personally opposed. There is no such problem in this case.

The reasons why The Florida Bar is a part or agency of the State of Florida are succinctly stated in the decision. and no purpose would be served by re-arguing them here. We emphasize that Florida law determines the status of The Florida Bar. *Louisiana Land & Exploration Company v. State Mineral Board,* supra.

Petitioner also contends that the source of the Bar's funds should be a consideration in determining whether The Florida Bar is a state agency. Under Florida law the status of a state agency is not dependent on the State being the source of its funds. There are many state agencies which derive all or most of their funds from other sources. *Spangler v. Florida State Turnpike Authority* (Fla. 1958) 106 So.2d 421; Florida Citrus Commission §§ 601.14 and

601.15, Florida Statutes; State Parks, §592.072, Florida Statutes; State Road Department, Chapter 334, Florida Statutes; Florida Public Service Commission, §§350.78 and 350.79, Florida Statutes.

Petitioner also appears to contend that the publication of The Florida Bar Journal is not a governmental function and that therefore it is not a state agency.[2] This is inconsequential in a consideration of this Petition because even though a state agency performs proprietary functions, neither the State nor the agency thereby becomes a citizen for the purpose of diversity jurisdiction in the United States District Courts. *Krisel v. Durand* (2 Cir. 1967) 386 F.2d 179, cert. denied 390 U.S. 1042.

Petitioner states that Florida's Integration Rule may violate the due process clause of the 14th Amendment, and cites therefor *Nebbia v. New York* (1933) 291 U.S. 502. This ground was not raised below and therefore under the decisions of this Court cannot be asserted for the first time here. *Duignan v. United States* (1927) 274 U.S. 195, 200; *Lawn v. United States* (1958) 355 U.S. 339, 362.

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[2]Some functions in the publication of The Florida Bar Journal are purely governmental in that by the Integration Rule different notices are required to be published there. Article III, 1(c)3; Article VII; Article IX, 2, 4, 5, 11; 32 F.S.A. 502-3, 505, 508 and 510. See also, Articles IV, 4, and VI, 2, and VII, 1, of the By-Laws under the Integration Rule. 32 F.S.A. 576-7, 1969 pocket part, p. 33 and 582.

CONCLUSION

It has not been established that there is any basis for the review of this decision. Conversely, it is affirmatively demonstrated that this decision does not come within any of the classes of cases reviewable by this Court. The Petition should be denied.

Respectfully submitted,

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